IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.341 OF 2005

Tejas Kanubhai Maun .. Appellant

vs.

Mohini Kanubhai Maun & Ors. .. Respondents.

Mr. R.A.Thorat for the Appellant.

CORAM : A.S.OKA, J.

DATED : 5th April, 2005.

P.C. :

1. Heard Shri Thorat for the Appellant. The Appellant is the Original Plaintiff. The Respondent No.1 is the mother of the Appellant Plaintiff and the Respondent No.2 is the married sister of the Appellant Plaintiff. The substantive relief claimed in the plaint filed by the Appellant is for declaration that the Respondent No.1 mother was benamidar of the deceased father in sale deed dated 10th June,1975. Another prayer is for declaration that the deceased father perfected this title in respect of the half share in the suit property by adverse possession. In the alternative, it is prayed that a license was granted in favour of the deceased father to make a permanent construction on

the suit plot of land and the license granted to the deceased father has become irrevocable.

2. The Application was made by the Appellant/Plaintiff at exhibit 5 praying for following reliefs:

> "The Plaintiff, therefore, prays that the Honourable Court be kindly pleased to grant temporary injunction in favour of the Plaintiff and against the Defendants restraining the Defendants from disturbing possession of the Plaintiff over the suit property and also from dealing with or disposing off the suit property and from creating any third party interest therein to prejudice. The Plaintiff by themselves or through any agent, servant or any other person for and on behalf or for them during the pendency of the suit and also from objecting, obstructing or preventing the Plaintiff from access to and over the suit property and any portion thereof; and to pass such other orders and grant such other reliefs as may be deemed fit and proper in the facts and circumstances of the case and for which act of kindness, the Plaintiff shall remain duty bound and ever pray."

3. The learned Trial Judge by a reasoned judgment has declined to grant interim relief in favour of the Appellant. The learned Trial Judge has considered the material placed on record by the Appellant and has come to the conclusion that the Appellant/Plaintiff has failed to prove prima facie

case.

4. The learned Counsel appearing for the Appellant submitted that a strong prima facie case regarding existence of Benami transaction was made out. He submitted that even assuming that injunction as regards protecting possession could not have been passed against the alleged co-sharers, the learned Judge by moulding the relief could have restrained the Respondent Nos.1 and 2 from dealing with the suit property.

5. The order refusing to grant temporary injunction under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908 is a discretionary order. I find that the discretion has been exercised by the learned trial Judge after discussing all the relevant factors. He also noted that the Respondent No.1 is the mother of the Appellant No.1 and the Respondent No.2 is the married sister of the Appellant. There is no reason to interfere with the discretionary order passed by the learned Trial Judge. Since the substantive suit filed by the Appellant is pending, if any transaction is made by the Respondent in respect of the suit property, section 52 of the Transfer of the Property Act, 1882

will always operate.

6. Subject to the observations made above, the Appeal is dismissed with no order as to costs.

7. All contentions of the parties on merits are kept open.

(A.S.Oka, J.)